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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, FRIGIDAIRE LOCAL 801, *Petitioner*;

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioner, International Union of Electrical, Radio and Machine Workers, AFL-CIO, Frigidaire Local 801, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit, entered on June 7, 1962, enforcing an unfair labor practice order issued by the National Labor Relations Board.

Opinions Below

The opinion of the Court below (Appendix A; *infra*, pp. 13-22) is reported at — F. 2d —, — U. S. App. D. C. —. The Decision and Order of the Board, as amended, (R. 30-46)[1] are reported at 129 NLRB 1379 and 130 NLRB 1286.

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[1] The reference "R" designates the certified record, which includes the portion of the record printed as a joint appendix to the briefs of the parties and the proceedings in the Court below.

Jurisdiction

The opinion and judgment of the Court below were entered on June 7, 1962 (Appendix A, *infra*, pp. 13-22, R. 217). On June 22, 1962, Petitioner filed a Petition for Rehearing with the court (R. 218-226). On July 5, 1962, the Petition for Rehearing was denied (R. 227) and on July 30, 1962, the decree enforcing the Board's order was entered (R. 228-234). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (62 Stat. 928) and Section 10 (e) and (f) of the National Labor Relations Act, as amended (61 Stat. 140, 29 U.S.C. § 160 (e) and (f), hereafter called the Act.

Question Presented

Whether in substituting a new ground for that on which the National Labor Relations Board based its decision and order, the court below exceeded its review powers by making findings of fact which had not been made by the Board.

Statute Involved

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136-162, 29 U.S.C. § 151 *et seq.*), are set forth in Appendix B, *infra*, pp. 23-26.

Statement

A. *The Contracts Between The Union and The Company*

International Union of Electrical, Radio and Machine Workers, AFL-CIO, Frigidaire Local 801 represents the production and maintenance employees of General Motors Corporation, Frigidaire Division at Dayton, Ohio. From June 12, 1955, to May 29, 1958, these employees were covered by a national collective bargaining agreement between the Company and the International Union of Electrical, Radio and Machine Workers, AFL-CIO, and several of its Locals, including Local 801 (R. 21, 31-32, 164).

Following the expiration of the 1955 agreement, a period ensued during which there was no collective bargaining agreement between the Company and the Union. A new collective bargaining agreement dated October 6, 1958 became effective on October 21, 1958. (R. 21, 32, 125-126, 180, 196, 200). The new agreement contained union security provisions identical to those contained in the prior agreement, with only one minor change to reflect the change in the dates of the new agreement (R. 32, 125-126, 181-186, 197-198). It required that non-members of the Union become members of the Union within 60 days after the 30th day following the effective date of the agreement, or within the 60th day after the 30th day following employment, whichever was later, and that such employees thereafter remain members of the Union to the extent of paying initiation fees and membership dues uniformly required as a condition of acquiring or retaining membership in the Union, whenever employed under and for the duration of the agreement (R. 22, 32, 181). As set forth in the agreement, the initiation fee for membership was $5.00, to be paid at the time an employee became a member of the Union (R. 182).

B. *Snyder's Resignation and Failure To Rejoin the Union*

Donald Snyder was a member of the Union from August, 1955, until May, 1958. Following the termination of the 1955 agreement between the Company and the Union, Snyder sent the Union a letter dated June 6, 1958, enclosing a check for union dues for April and May, 1958, and advising the Union that this payment terminated his membership in the Union (R. 21, 32, 53, 192).

By operation of the terms of the union security provisions of the new agreement, Snyder, who was not a member of the Union on its effective date, was required to be-

come a member of the Union by January 19, 1959, the last day of the 60-day period after the thirtieth day following the effective date of the agreement (R. 32, 181). Pursuant to the agreement, Snyder was required to pay an initiation fee of $5.00 and dues for the month of January by that date (R. 28, 32, 181-182). Snyder did not become a member of the Union as of that date nor did he make any effort to tender his initiation fee and dues to the Union (R. 32).

C. *The Request for Snyder's Discharge and His Discharge*

As of February 23, 1959, Snyder had still not applied for membership in the Local Union. On that date the Financial Secretary of the Union, telephoned James N. Rife of the Company's Labor Relations Department, and told him that Snyder had resigned from the Union and had not rejoined. He told Rife that Snyder was in serious trouble, that the Union was going to request his discharge, and that he would probably write a letter requesting Snyder's discharge. (R. 22-23, 32, 105-106).

On February 26, the executive board of the Union met and voted to request Snyder's removal from the bargaining unit because he had not applied for membership and paid dues and an initiation fee as required by the union security provisions of the agreement (R. 133-134).

The following morning at a negotiating meeting between the Union and Company labor relations representatives, during a lull in negotiations, Union President Shump informed Company representatives that the Union executive board had voted the night before to request Snyder's discharge and that a letter would be received by the Company containing a written request for his discharge (R. 110). Such a letter was sent on March 3, 1959, and was received by the Company labor relations representative Rife on March 4, 1959 (R. 24, 33, 106, 170).

On the morning of February 26, 1959, the day of the Union executive board meeting, Snyder went to see his general foreman Ferguson who was also a fairly close friend. (R. 54-55, 93, 97). According to Snyder, he asked Ferguson if it was necessary or compulsory that he belong to the Union to retain his job. Ferguson looked at some papers and said that it was (R. 54, 90).

The next day, February 27, 1958, after the local executive board had met and decided to request Snyder's discharge, Snyder obtained a money order for $15.00 and marked on its face "Dues in full for Oct. Nov. Dec. 1958 Jan. & Feb. 1959." Snyder sent the money order to the Local Union with a covering letter reiterating its purpose (R. 23, 32, 165-166).

Snyder's letter and money order were received by the Union on February 28, 1959, after the Union had orally informed the Company of the Union executive board decision (R. 108, 127). Local President Shump instructed that it be sent back to Snyder (R. 23, 130-132).

Thereafter, Snyder went to representatives of the Company's Labor Relations Department and talked with them concerning his status. (R. 24, 33, 66-69, 153-157, 159-164). On March 21, 1959, Snyder sent another money order to the Union in the amount of $3.00 marked as a payment for March dues, which was also returned to Snyder by the Local Union. (R. 24, 33, 69-71, 156, 158, 169.)

At no time either before or after the Union requested Snyder's discharge, did Snyder approach any Union representative in an attempt to straighten out his status. By his own admission, Snyder dealt exclusively with Company representatives because he preferred to deal with the Company, even when advised by the Company representatives to go to the Union directly (R. 26, 73, 103). On April 6, 1959, Snyder was discharged pursuant to the Union's request.

Evidence was introduced, which showed, among other things, that Snyder was aware of his obligations under the union security provisions of the 1955 agreement (R. 21, 31, 51-52); that considerable publicity attended the execution of the new agreement following a brief strike during which Snyder did not work (R. 91, 92, 138); that twelve thousand printed copies of the 1958 agreement were made available for the 11,000 Frigidaire employees (R. 138-139, 180); that employees were reminded of their obligation to pay dues by leaflets distributed at plant gates, the customary means of communication with employees (R. 138, 195); that Snyder had heard nothing to make him think that the union security provision had been changed or deleted in the new agreement (R. 87-88), and that Snyder in fact indicated awareness of his obligation to join the Union under the new agreement (R. 148). In the face of substantial evidence to show that at all times material Snyder was or should have been aware of his obligation to rejoin the Union, Snyder never denied that he was aware of this obligation.

D. *The Trial Examiner's Intermediate Report*

The Trial Examiner found that the sole reason for Snyder's discharge was his failure to tender his initiation fee and dues at any time prior to his discharge, and that there was nothing in the record to indicate that such a tender would have been futile (R. 27-28). He found specifically that "it is incredible that Snyder . . . was naive enough to believe that the Union security clause had not begun to run as far as he was concerned," and that at least on February 26, 1959, Snyder was specifically told that it was necessary for him to join the Union, but that even from then he failed to make a proper tender of initiation fee and dues. Accordingly, the Trial Examiner recommended that the complaint be dismissed in its entirety. (R. 28-30)

E. *The Decision and Order of the Board*

The Board found that as of January 19, 1959, when Snyder became obliged to pay his dues and initiation fee, Snyder had made no tender. The Board found that Snyder was made cognizant of his membership obligation in his conversation with his supervisor Ferguson on February 26, 1959, and that subsequent to that conversation, he mailed his money order as described above (R. 32). The Board found that nobody explained to Snyder the mechanics of reinstatement[2] and concluded that "in view of the fact that Snyder's tender was sufficient in amount and was made in good faith, the Respondent Union was under an obligation before rejecting the tender to explain the mechanics of reinstatement to Snyder and give him the opportunity to direct the allocation of his tender in the manner required by the Union's rules for reinstatement." The Board concluded that the tender of February 27 was adequate, that it was made before the Union's letter was sent requesting his discharge and that it was timely. On this basis, the Board decided that Snyder was discharged for reasons other than his failure to pay periodic dues and initiation fees in violation of Section 8(a)(1) and (3) and 8(b)(1) and (2) of the National Labor Relations Act.

F. *The Decision of the Court Below*

The Court below did not rely on the Board's reasoning but substituted as the basis for its decision its holding that "the Union may not refuse a good faith tender of dues made within a reasonable time after the employee has learned or reasonably should have learned that he must

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[2] The Board was in error in its finding that the issue stemmed from Snyder's failure to seek reinstatement as required by union rules. The record indicates that it related to Snyder's failure as a nonmember to join the Union as required by contract.

join the Union in order to keep his job." Finding that a tender of more than the necessary sum for membership was received by the Union within a reasonable time after Snyder was informed of his obligation, the court enforced the Board's order.

Reasons For Granting the Writ

1. *The Decision of the Court Below Is In Conflict With Decisions of this Court and The Courts of Appeals*

In substituting its grounds of decision for those of the Board, the court below of necessity made findings of fact which the Board had not made, and exceeded the reviewing role accorded it under Section 10 (e) and (f) of the Act, contrary to the decision of this Court in *Universal Camera Corp.* v. *N.L.R.B.*, 340 U. S. 474.

The Court's substituted ground for decision would warrant enforcement of the Board's order only if it were not true that Snyder had learned, or reasonably should have learned, more than a reasonable time before he made his tender that he was required to join the Union in order to keep his job. The Board, not faced with this issue, found only that there was no indication that Snyder "was made cognizant" of his obligation on February 23, 1959 (R. 32). Such a finding does not carry with it the conclusion that Snyder did not know at that time that he was required to join the Union. But, even assuming that the Board's finding could be construed as a finding that Snyder had not learned prior to that date that he was required to join the Union, the Board made no finding as to whether before February 23, Snyder reasonably should have learned that he was required to join the Union.

Whether or not Snyder reasonably should have learned of his obligation to join the Union is a question to be determined upon the evaluation of the evidence and the infer-

ences to be drawn therefrom. The evaluation of the evidence and the drawing of such inferences, as the Court itself recognized is for the Board and not for the Court (Appendix A, *infra*, p. 15).

Section 10 (c) of the National Labor Relations Act, 29 U.S.C.A., § 160 (c), charges the Board with the duty of stating findings of fact in support of its orders. (Appendix B, *infra*, p. 24.) Section 10 (e), 29 U.S.C.A., § 160 (e), provides that in any proceeding to enforce an order of the Board, "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." Section 10 (f) relating to review proceedings provides similarly (Appendix B, *infra*, p. 25). Nothing in the Act bestows upon the reviewing Court the authority to substitute its findings for those of the Board.

In *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 488, this Court held that Section 10 (e) was not intended "to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. Nor does it mean that, even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the Court would justifiably have made a different choice had the matter been before it *de novo*."

In reaching its conclusion that the facts supported its basis of decision, the court below assumed the function of the Board as finder of the facts in conflict with the *Universal Camera* decision.

The decisions of the Courts of Appeals, including the court below, further confirm that the court below in this

case exceeded its capacity." "The Board, as has been frequently pointed out, is the judge of the facts, the credibility of the witnesses, and the weight of the evidence, and may draw inferences from circumstantial, as well as direct, evidence." *Kitty Clover, Inc.* v. *N.L.R.B.*, 208 F. 2d 212, 214 (C.A. 8, 1953). "The amendment [Section 10 (e)], like its predecessor, does not permit the court to weigh evidence or to substitute its judgment for the Board's as to what conclusions are to be drawn from the evidence," *Joy Silk Mills* v. *N.L.R.B.*, 87 U.S. App. D.C. 360, 366, 185 F. 2d 732, 738 (1950), *cert. denied* 341 U.S. 914; See also *International Woodworkers of America, AFL-CIO* v. *N.L.R.B.*, 104 U.S. App. D.C. 344, 345, 262 F. 2d 233, 234 (1958); *N.L.R.B.* v. *Cold Spring Granite Company*, 208 F. 2d 163, 164, 165 (C.A. 8, 1953); *Victor Mfg. & Gasket Company* v. *N.L.R.B.*, 174 F. 2d 867 (C.A. 7, 1949). Cf. *Local 613, Electrical Workers* v. *N.L.R.B.*, 303 F. 2d 359, 364 (C.A. 3).

The making of such findings falls precisely in the area which the court below in *William Chae-Sik Lee* v. *Kennedy*, 111 U.S. App. D.C. 35, 294 F. 2d 231, 234 (1961), *cert. denied* 368 U.S. 926, held warranted remand of administrative proceedings.

In *N.L.R.B.* v. *Capital Transit Company*, 95 U.S. App. D.C. 310, 313, 221 F. 2d 864, 867 (1955), the court below applied these principles, remanding for further proceedings in the absence of findings to support an alternative basis for decision. It held,

> "[S]ince the Board failed to make findings in connection with these reasons 'we cannot decide now whether [they] suffice to support the order.' 'The grounds upon which an adminstrative order must be judged are those upon which the record discloses that its action was based.' Findings are essential not only

> to facilitate judicial review by revealing the factual basis for agency action but also to reflect the determination of policy or judgment which the agency alone is authorized to make * * *." (footnotes omitted) [3]

In the instant case there is substantial evidence to support a finding that Snyder reasonably should have learned that he was required to become a member of the Union long before any request for his discharge was made. In view of the Board's failure to consider the ground on which the Court has based its decision, the proceeding should have been remanded to the Board to make findings as to whether Snyder reasonably should have learned of his obligation to join the Union a reasonable period of time prior to the request for his discharge. Remand was particularly warranted in this case in view of the fact that the Trial Examiner's findings support Petitioner's position, (R. 27), were rejected by the Board (R. 31), and the Board did not take a contrary position in its brief to the court below. See *Joy Silk Mills* v. *N.L.R.B.*, 87 U.S. App. D.C. 360, 370, 185 F. 2d 732, 742 (1950), cert. denied 341 U.S. 914.

In sum, the action of the court was contrary to the holding of both this Court and Courts of Appeals, previously acknowledged by the court below, that the making of findings of fact necessary to support Board orders are the responsibility of the Board, and not the reviewing courts.

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[3] While some courts have declined to remand proceedings for further findings to support an alternative basis for decision, they have not undertaken to substitute their findings for those of the Board to sustain its order. To the contrary, they have dismissed the Board's enforcement petitions without affording the Board the opportunity to support alternative grounds. *N.L.R.B.* v. *Brown & Root, Inc.*, 206 F. 2d 73 (C.A. 8, 1953); *American Brake Shoe Co.* v. *N.L.R.B.*, 244 F. 2d 489 (C.A. 7, 1957).

The issue thus raised is one of utmost importance to the administration of the Act, for it goes to the heart of the statutory scheme provided for its administration. The decision below unsettles the relationship between the Board and the reviewing courts and leaves vulnerable to erosion the Board's role as expert finder of the facts.

Conclusion

For the reasons stated, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16273

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO; FRIGIDAIRE LOCAL 801, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

No. 16301

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

GENERAL MOTORS CORPORATION, FRIGIDAIRE DIVISION, *Respondent*.

On Petitions To Review And Enforce An Order of The National Labor Relations Board

Decided June 7, 1962

Mr. David S. Davidson, with whom *Mr. Benjamin C. Sigal* was on the brief, for petitioner in No. 16273.

Mr. Hans J. Lehmann, Attorney, National Labor Relations Board, with whom *Messrs. Stuart Rothman*, General Counsel, National Labor Relations Board, *Dominick L. Manoli*, Associate General Counsel, National Labor Relations Board, *Marcel Mallet-Prevost*, Assistant General Counsel, National Labor Relations Board, and *Allison W. Brown, Jr.*, Attorney, National Labor Relations Board, were on the brief for respondent in No. 16273 and petitioner in No. 16301.

Mr. K. Douglas Mann, with whom *Mr. George L. Derr* was on the brief, for respondent in No. 16301.

Before EDGERTON, BAZELON and BURGER, *Circuit Judges*.

BURGER, *Circuit Judge*: Case No. 16273 comes to us on the petition of the International Union of Electrical, Radio, and Machine Workers, AFL-CIO, Frigidaire Local 801, (Union) to review a National Labor Relations Board order of January 1961. The Board cross-petitions for enforcement of that order against the Union. Case No. 16301 is brought here by the Board petitioning for enforcement of the same order against General Motors Corporation, Frigidaire Division, (Company) also a party to the proceeding below.[1] Jurisdiction of this court rests on Sections 10(3) and 10(f) of the National Labor Relations Act, as amended 61 Stat. 135, 73 Stat. 519, 29 U.S.C. § 151, et. seq., hereafter called the Labor Act. The Board found that the Union violated Sections 8(b)(1)(A) and (2) of the Labor Act by refusing a valid tender of dues and thereafter causing Snyder's discharge for failure to join the Union. The Board also found the Company violated Section 8(a)(3) and (1) of the Labor Act by discriminatorily discharging Snyder at the demand of the Union when the Company had reasonable grounds to believe Snyder's membership had been denied for reasons other than failure to tender fees and dues. The challenged order (1) requires the Union to notify one Donald L. Snyder and the Company that the Union withdraws its objections to Snyder's employment, and directs the Union to request the Company to offer Snyder reinstatement, and (2) requires the Company to offer Snyder immediate and full reinstatement.

Donald Snyder had been employed by General Motors at its Dayton, Ohio plant for 30 years prior to April 6, 1959 when at Union insistence the Company discharged him. The facts leading up to discharge upon which the Board relied are significant. From August, 1955 to June, 1958, under the terms of a valid Union security agreement, Snyder had been a Union member. Effective shortly after the expiration of the Union agreement with the Company on May 31, 1958, Snyder terminated his membership. No one challenges his right to terminate Union membership

[1] The Board's Decision and Order are reported at 129 NLRB No. 169 and 130 NLRB No. 132.

during a period when no collective bargaining agreement was in force. Thereafter, following a walkout by the Union, a new aggeement was negotiated by the Union and the Company on October 6, 1958, to become effective October 21, 1958. By its terms any employee who was not a Union member on the effective date would be required, on pain of discharge, to become a member within 90 days thereafter, that is, by January 19, 1959, by payment of a five dollar initiation fee and membership dues for the month of January or a total of $8.00. Snyder did not pay the requisite amounts nor did he join the Union by January 19th. Approximately a month later, on February 23, 1959, when Snyder still had not joined the Union, the Union Financial Secretary, Arch Little, informally notified James Rife of the Company's Labor Relations Department that Snyder was in serious trouble and that a Union request for his discharge could be expected.

Until this period in late February, the record does not indicate, except perhaps by inference which the Board in its discretion was free to draw or not, that Snyder was apprised by anyone, Union or Company, of his obligations under the new agreement. Snyder further denied that he ever saw a copy of the 1958 agreement before April 3, 1959. And there is no evidence to demonstrate that Snyder learned of the new agreement or of its contents through the newspaper, television or radio announcements noting the strike settlement in October 1958, nor through the various leaflets which were handed out to employees by the Union thereafter.

Accordingly the Board found that Snyder's first awareness of the necessity of Union membership if he was to keep his job came on February 26, 1959 when he approached the Company foreman Ferguson to inquire if such were the case. Upon learning that it was, Snyder replied that he would get a money order and send his dues in to the Union. On the following day Snyder mailed to the Union a money order for $15.00.

By coincidence the Union executive board also met on February 26 and voted to request Snyder's discharge for failure to apply for membership and to pay the required

initiation fees. The following morning, Union President Shump informally indicated to Company representatives that the executive board had agreed the night before to ask for Snyder's discharge, and that the Company could anticipate receiving a formal written request by the Union for Snyder's dismissal. Snyder's $15 money order which was sent on the 27th was accompanied by a letter stating that the amount was for dues in full for October, November and December of 1958, and January and February of 1959. Snyder testified without contradiction that he had not thought of the initiation fee and had not been informed of it. It is to be observed that as of this date Snyder only owed $11, $5 for initiation fee and $6 for two months's dues (January and February), so he was actually overpaying the Union by $4 when he tendered $15 apparently on the theory that he could accomplish reinstatement by paying dues back to the date of the new Union contract whose terms the Superintendent had described to him on the 26th. The Union received the money order on February 28, and at President Shump's direction it was sent back to Snyder without any explanation on March 3. On March 3 the Union formally demanded that the Company discharge Snyder pursuant to the Union security agreement. The Company received this request on March 4. Union President Shump testified that one reason the money order was returned to Snyder was because he did not "spell out" that $5 of the sum was for the initiation fee.

Snyder meanwhile inquired of a Company Labor Department staff member why the $15 had been returned and was told on March 5 that it was because he was not a Union member. Snyder thereupon obtained a membership application and an authorization card for the check-off of dues, both of which he filled in and returned to the Labor Department staff man, along with the original $15 money order dated February 27.

Later in March Snyder mailed in an additional three dollars dues for that month, which the Union returned to him on April 1, again without explanation. In the meantime, Snyder remained on Company payrolls, a circumstance which on April 1st moved the Union to file a griev-

ance with the Company requesting that the Company fulfill its obligation to discharge Snyder. In meetings between Union and Company representatives on April 1 and 2, although a Company representative showed the Union the membership application and dues check-off authorization signed by Snyder, the Union stated it was "too late" for Snyder to obtain membership, and refused to meet with him to discuss the matter. On April 6, 1959, thus confronted with the Union's unrelenting attitude, the Company ended Snyder's thirty year tenure by discharging him, thereby simultaneously cutting off all his pension rights accumulated over a lifetime of service with General Motors.

The general scheme of the Labor Act makes it illegal to require union membership as a condition of employment or to discharge an employee for non-membership. Congress permitted an exception where the collective bargaining contract makes union membership a condition of employment. But that exception was carefully narrowed by the terms of the statute. Even under a valid union security contract a union cannot lawfully demand the discharge of an employee if membership

> has been denied . . . on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required

of members. Sec. 8(b)(2), 29 U.S.C. § 158(b)(2) (1958). And the employer is forbidden to effect a discharge unless he has no reasonable ground for believing that the employee's membership was denied for reasons other than his failure to make a tender. Sec. 8(a)(3), 29 U.S.C. § 158(a)(3) 1958).

> Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees. *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 41 (1954).

See also *Puerto Rico Drydock & Maxine Terminals* v. *NLRB*, 109 U.S. App. D. C. 78, 284 F. 2d 212, *cert. denied*, 364 U.S. 883 (1960).

The Union urges that we must overturn the Board's order (1) because Snyder failed to make timely tender of dues and initiation fee by January 19, 1959, the last day of the 90 day period, or (2) in the alternative, because Snyder's tender, even if timely, was ineffective since it failed to allocate a part of the sum tendered specifically to the payment of an initiation fee. Neither of these contentions can be sustained.

We hold the Union may not refuse a good faith tender of dues made within a reasonable time after the employee has learned or reasonably should have learned that he must join the Union in order to keep his job.[2] *Cf. NLRB* v. *Aluminum Workers*, 230 F.2d 515, 520 (7th Cir. 1956). Snyder was not forever barred from Union membership when he failed by January 19th to offer an application for membership along with the necessary monies, inasmuch as the record supports a view that he was not apprised of the necessity of membership before February 26. His technically belated tender, on February 27, 1959, of more than the necessary sums for membership, was received by the Union within a reasonable time after he was informed of this necessity. The Union's rejection of this tender was therefore improper, unless the tender itself was improperly made.[3] We hold it was properly made.

Among the most important of labor standards imposed by the Act as amended is that of fair dealing, which is demanded of unions in their dealings with employees. See *NLRB* v. *International Woodworkers*, 264 F.2d 649, 657 (9th Cir.), *cert. denied*, 361 U.S. 816 (1959). The require-

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[2] Assuming, *arguendo*, that the Board erroneously based its correct conclusion as to discrimination on another ground, we are free to affirm the Board without offending S.E.C. v. Chenery Corp., 318 U.S. 80 (1943), on this alternative "ground within the power of the appellate court to formulate." William Chae-Sik Lee v. Kennedy, —— U.S. App. D.C. ——, 294 F.2d 231, 234, *cert. denied*, 368 U.S. 926 (1961).

[3] The record supports the Board's finding that the Union did not make a definite demand for Snyder's discharge under the contract until March 3, 1959. By that time the Union had received a tender in excess of the amount Snyder owed and had rejected the payment. The cases cited by the Union do not apply to these facts for they deal with situations where the Union demand preceded any payment or tender.

ment of fair dealing between a union and its members is in a sense fiduciary in nature and arises out of two factors. One is the degree of dependence of the individual employee on the union organization; the other, a corollary of the first, is the comprehensive power vested in the union with respect to the individual. See *NLRB* v. *International Woodworkers*, *supra*. The requirement of fair dealing is not limited to union members; when an individual becomes an employee of a company having a union security clause in its contract the new employee is not free to join or refuse to join a union, nor does he have a voice in the selection of his bargaining representative. He takes the existing union and its contract in effect as one of the conditions of his employment. From the beginning of his employment, the union which can require his membership or command his discharge is therefore charged with an obligation of fair dealing which includes the duty to inform the employee of his rights and obligations so that the employee may take all necessary steps to protect his job.

A union may not treat as adversaries either its members or those potential members whose continued employment is dependent upon union membership. The Union's failure to inform Snyder of what he needed to do to protect his rights made it impossible for him to make a proper tender sooner than he did. The Union is bound by law to represent all employees in the bargaining unit. The Union is the agent for employees and as such "is subject to a duty to use reasonable efforts to give his principal information which is relevant to affairs entrusted to him and which, as the agent has notice, the principal would desire to have . . ." Restatement (Second), Agency § 381 (1958). The Union's assertion of improper tender, based on Snyder's failure specifically to allocate the $15 to dues and the initiation fee respectively, must be viewed by the Board and the court in the context provided by the statutory concept of fair play. We think a minimum of fair treatment would have included at least some notice to Snyder that his tender was excessive and that he should have indicated the manner in which he wished the money applied. Out-of-hand rejection of the money order, without

a word of explanation, amounts in our view to an arbitrary failure on the Union's part to meet its obligations and peculiar responsibilities under the Act. As we agree that Snyder made the tender in good faith, the Board was clearly correct in asserting that the Union "was under an obligation to explain the mechanics of reinstatement to Snyder and give him the opportunity to direct allocation of his tender in the manner required by the Union's rules for reinstatement." See *NLRB* v. *International Woodworkers*, *supra* at 657.

> Under the standard of fair treatment, which both the Wagner and the Taft-Hartley Acts invoke, the least that the Union officials could have done would have been to advise Hatfield that no former application had been found, and give an opportunity then to make, or refuse to make, an application for membership. *Ibid.*
>
> The bargaining representative, whoever it may be, is responsible to, and owes complete loyalty to, the interests of all whom it represents. *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338 (1953).

These considerations add support to the Board's further findings that the Union's request for Snyder's discharge was not truly predicated on his failure to pay necessary dues and fees.

The Union vigorously attacks the Board's failure to make affirmative findings as to the facts which led to the demand for discharge. The record shows a history of mutual hostility between Snyder and the Union growing out of a history of tardiness in payment of dues, refusal to sign a dues check-off authorization under the prior Union contract, termination of membership during the "no-contract" interval and apparent support of then pending Michigan enactment of a so-called "right-to-work" law. But it was not necessary for the Board to make any assessment of responsibility for this mutual hostility since the Board was not required to make an *affirmative* determination that all or any of these factors comprised the actual

basis or motivation for the Union's demand for Snyder's discharge. No affirmative finding as to the cause of discharge is needed. Under the language of the statute the Union commits an unfair labor practice when it causes an employer to discriminate against an employee "on some ground *other than* his failure to tender the periodic dues and the initiation fees uniformly required. . . ." 61 Stat. 136 (1947), 29 U.S.C. § 158(b)(2) (1958). (Emphasis added.)

Similarly, as all the relevant facts of Snyder's tender and the Union's unexplained rejection were known to the Company, and as it had notice on February 26 and March 5 of Snyder's unawareness of the necessity of Union membership, it had reasonable grounds for recognizing and should have recognized that the Union's request was not based on the only grounds Congress permits for a discharge demand, and its decision to yield to the Union's will was thus properly viewed by the Board as knowing discrimination and violation of §§ 8(a)(3) and (1) of the Act.

The petition to set aside the Board's order in No. 16273 will be denied. The Board's cross-petition for enforcement of its order against the Union in No. 16273 will be granted, as will its petition for enforcement of the order against the Company in No. 16301.

Petition in No. 16273 denied.

Petition in No. 16273 denied.

Petition for enforcement in No. 16301 granted.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1961

No. 16,273

INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, ETC.

v.

NATIONAL LABOR RELATIONS BOARD

Before: *Edgerton*, *Bazelon* and *Burger*, Circuit Judges, in Chambers.

ORDER

Upon consideration of petitioner's petition for rehearing, it is

ORDERED by the court that the petition be, and it is hereby, denied.

Per Curiam.

Dated: July 5, 1962.

APPENDIX B

Statute Involved

The statute involved is the National Labor Relations Act, as amended, Act of June 23, 1947, c. 120, 61 Stat. 136-162, 29 U.S.C. § 151 *et seq.*

The relevant parts of the statute are:

"'Sec. 8(a). It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; . . .

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States shall preclude any employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and con-

ditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . .

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . .

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

Sec. 10 (c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * * If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the

complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. * * *

Sec. 10 (e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. * * * The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was

alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. * * * Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.